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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ELIZABETH JIMENEZ) Case No. CV 08-08403-MLG
Plaintiff,) MEMORANDUM OPINION AND ORDER
v.)
MICHAEL J. ASTRUE,)
Commissioner of the Social)
Security Administration,)
Defendant.)

Plaintiff Elizabeth Jimenez seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance ("SSDI") benefits. For the reasons stated below, the matter is remanded for an award of benefits.

I. Procedural and Factual Background

Plaintiff filed her application for SSDI benefits on February 6, 2003, alleging disability as of July 22, 1992 due to post-surgical back and knee pain, anemia and depression. (Administrative Record ("AR") at

1 128.) Plaintiff was born in 1957. She has a high school education and
 2 attended two years of college. She has worked as a nurse and medical
 3 office manager. (AR at 141, 146.) Plaintiff was insured for disability
 4 benefits through December 31, 2000.¹

5 Plaintiff's application for benefits was denied initially and upon
 6 reconsideration. (AR at 82-85, 88-91.) An administrative hearing was
 7 held November 17, 2004 before Administrative Law Judge ("ALJ") Helen E.
 8 Hesse. (AR at 48.) On March 11, 2005, the ALJ issued a decision finding
 9 that Plaintiff was not disabled. (AR at 60-61.) Plaintiff's request for
 10 review was denied by the Appeals Council on December 22, 2005. (AR at 6-
 11 10.) Plaintiff then sought review in this Court. On December 20, 2006,
 12 this Court remanded the case to the Commissioner for further
 13 proceedings. (AR at 1095.) The Court found that ALJ Hesse failed to
 14 provide a legally sufficient basis for discrediting Plaintiff's
 15 allegations of pain. *Jimenez v. Barnhart*, CV 06-1145-MLG. (AR at 1085-
 16 1094.)

17 On March 25, 2008, a second hearing was held before ALJ Hesse. (AR
 18 at 1109.) On May 14, 2008, ALJ Hesse issued a decision determining that
 19 Plaintiff was not disabled. (AR at 1055-1068.) ALJ Hesse found that
 20 Plaintiff suffered from the following severe impairments: status post
 21 L2-3 microdiscectomy and L5-S1 fusion with instrumentation; status post
 22 left knee arthroscopic surgery; status post right knee arthroscopic

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 24 ¹ In order to qualify for disability insurance benefits, Plaintiff
 25 is required to establish that she was disabled on or before the date of
 26 termination of her insured status. 20 C.F.R. §404.131(b)(1); *Flaten v.*
27 Sec'y of Health & Human Serv., 44 F.3d 1453, 1463 (9th Cir. 1995);
Vincent ex rel. Vincent v. Heckler, 739 F.2d 1393, 1394 (9th Cir. 1984).
 Plaintiff was therefore required to establish that she was disabled on
 28 or before December 31, 2000 in order to be eligible for disability
 benefits.

1 surgery; status post second left knee arthroscopic surgery; status post
2 second right knee arthroscopic surgery; and disc herniation at T5-6 with
3 neck surgery in March of 1999. (AR at 1057.) However, the ALJ determined
4 that Plaintiff's impairments did not meet or medically equal one of the
5 listed impairments in 20 C.F.R., Part 404, Subpart P, Appendix 1. (Id.)
6 The ALJ determined that Plaintiff retained the residual functional
7 capacity ("RFC") to perform light work with the following limitations:
8 Plaintiff was precluded from working at unprotected heights, climbing
9 ladders, or being around hazardous machinery; she also was able to reach
10 above shoulder level bilaterally on occasion, but could not maintain any
11 neck position on a prolonged basis or constantly change neck positions.
12 (AR at 1057-1058.) Based on this RFC, the ALJ concluded that Plaintiff
13 would be capable of performing her past relevant work as a medical
14 assistant. (AR at 1068.) The ALJ therefore found that Plaintiff was not
15 disabled under the Social Security Act. (Id.) On October 28, 2008, the
16 Appeals Council denied review, and ALJ Hesse's second decision became
17 the final decision of the Commissioner. (AR at 1044-1046.)

18 On January 9, 2009, Plaintiff timely commenced this action for
19 judicial review. On August 12, 2009, the parties filed a Joint
20 Stipulation ("Joint Stp.") of disputed facts and issues. Plaintiff
21 contends that (1) the ALJ's RFC assessment was not supported by
22 substantial evidence and (2) the ALJ failed to properly evaluate
23 Plaintiff's subjective symptoms and credibility. (Joint Stp. at 2-3.)
24 Plaintiff seeks reversal of the Commissioner's denial of her application
25 and payment of benefits. (Joint Stp. at 15-16.) The Commissioner
26 requests that the ALJ's decision be affirmed, or in the alternative,
27 remanded for a new administrative hearing. (Joint Stp. at 16-17.)
28 Because this Court finds that Plaintiff is entitled to relief on the

1 claim that the ALJ failed to properly evaluate her credibility, the
 2 Court will not address Plaintiff's other claim of error.

3 Because both parties are familiar with Plaintiff's lengthy medical
 4 history, the Court will only provide a brief summary of the relevant
 5 medical records.² Plaintiff first injured her back in February of 1986
 6 while stacking supplies. She re-injured her lower back in April of 1991,
 7 while lifting and stacking storage boxes, and again on May 15, 1991,
 8 when she turned in her chair at a staff meeting while holding a stack of
 9 papers. An MRI of the lumbar spine on July 1, 1992, revealed "moderate
 10 midline disc bulge seen at L2-3" and "mild desiccation and midline disc
 11 bulge seen at L5-S1." (AR at 709-710.) The condition of Plaintiff's
 12 lumbar spine continued to worsen, eventually leading to back surgery on
 13 February 22, 1994.³ (AR at 610.)

14 In June of 1993, Plaintiff fell and landed on her knees on a cement
 15 floor, and she began to complain of pain in both of her knees. A MRI
 16 performed on Plaintiff's left knee in October of 1994 revealed a medial
 17 meniscus tear. (AR at 533.) Left and right knee surgeries were performed
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 21 ² Plaintiff was treated by at least thirty-five physicians during
 22 the time period at issue. (AR 708-729.) The summary that follows is
 23 taken primarily from the medical reports of orthopedic surgeon Dr. Gil
 24 Tepper, who performed all of the surgeries on Plaintiff. As discussed
 25 below, only Plaintiff's orthopedic impairments are relevant to this
 26 Court's decision. Plaintiff also allegedly suffers from other physical
 27 and mental impairments that do not require discussion.

28 ³ The lumbar surgery included the following procedures: 1. Micro
 29 laminotomy and discectomy, L2/3 on the right. 2. L5/S1 laminectomy, Gill
 30 procedure. 3. Total discectomy posterior lumbar inner body fusion. 4.
 31 Neurolysis of the L5 and S1 nerve roots bilaterally. 5. Posterior lumbar
 32 inner body fusion using allograft.

1 on December 9, 1994,⁴ and July 5, 1995,⁵ respectively. (AR at 601, 606.)
 2 Plaintiff continued to experience "mechanical symptoms, recurrent
 3 effusions, buckling, catching, and giving-way episodes" with her right
 4 knee, and a second surgery was performed on August 26, 1997.⁶ (AR at
 5 596.) A second left knee surgery was performed on February 15, 2000.⁷ (AR
 6 at 589.)

7 On November 22, 1994, Plaintiff reported that she fell and struck
 8 her right shoulder, and was experiencing shoulder pain. Dr. Tepper
 9 diagnosed Plaintiff with grade I acromioclavicular ligament strain of
 10 the right shoulder. (AR at 529.) Plaintiff subsequently complained⁸ of
 11 pain in her neck, shoulders, and between her shoulder blades, and a MRI
 12 of the cervical spine performed on April 5, 1996 revealed "[c]entral 3mm
 13 C5-C6 disc herniation with left neural foraminal narrowing." (AR at 508,
 14 511.) Plaintiff was eventually diagnosed with C4-5 and C5-6 disc

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 17 ⁴ The following procedures were performed: 1. Left knee
 18 chondroplasty, medial patellar facet. 2. Chondroplasty, lateral tibial
 19 plateau.

20 ⁵ The following procedures were performed: 1. Right knee
 21 arthroscopic chondroplasty, medial patellar facet and medial femoral
 22 condyle. 2. Extensive plica resection and synovectomy.

23 ⁶ The following procedures were performed: 1. Right knee
 24 arthroscopic chondroplasty, weightbearing dome, medial femoral condyle.
 25 2. Right knee arthroscopic chondroplasty, trochlea. 3. Right knee
 26 arthroscopic removal of loose bodies.

27 ⁷ The following procedures were performed: 1. Left knee
 28 arthroscopic chondroplasty, medial femoral condyle and patella. 2. Left
 29 knee arthroscopic removal of loose bodies. 3. Synovectomy and resection
 30 of plica.

31 ⁸ There is a gap in the records from Dr. Tepper between March 16,
 32 1995, and April 28, 1996. Plaintiff did not complain of neck pain at her
 33 March 16, 1995 examination, and a MRI of the cervical spine was
 34 performed on April 5, 1996. Plaintiff's pain presumably began at some
 35 point between those two dates.

1 herniation with central and lateral cervical canal stenosis with
 2 kyphosis and segmental instability. (AR at 591.) Plaintiff underwent
 3 cervical spine surgery on March 25, 1999.⁹ (Id.)

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5 **II. Standard of Review**

6 Under 42 U.S.C. § 405(g), a district court may review the
 7 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
 8 decision must be upheld unless "the ALJ's findings are based on legal
 9 error or are not supported by substantial evidence in the record as a
 10 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra v.*
 11 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
 12 such evidence as a reasonable person might accept as adequate to support
 13 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
 14 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
 15 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
 16 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
 17 evidence supports a finding, the reviewing court "must review the
 18 administrative record as a whole, weighing both the evidence that
 19 supports and the evidence that detracts from the Commissioner's
 20 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
 21 the evidence can support either affirming or reversing the ALJ's
 22 conclusion," the reviewing court "may not substitute its judgment for
 23 that of the ALJ." *Robbins*, 466 F.3d at 882.

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25 ⁹ The following procedures were performed: 1. Anterior partial
 26 vertebrectomy, C4 and C5. 2. Anterior total nuclear diskectomy, C4-5 and
 27 C5-6. 3. Anterior interbody fusion, C4-5 and C5-6. 4. Open reduction
 28 with internal fixation, C4-5 and C5-6. 5. Bilateral foraminotomy and
 neurolysis of the exiting C-6 nerve roots under microscope. 6. Allograft
 shaping. 7. Autologous bone harvest. 8. Continuous intraoperative spinal
 cord evoked potential monitoring.

1 **III. Credibility of Plaintiff's Pain Testimony**

2 Plaintiff claims that the ALJ erred by improperly discrediting her
 3 subjective complaints of pain. (Jt. Stip. at 12.) To determine whether
 4 a claimant's testimony about subjective pain or symptoms is credible,
 5 the ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d
 6 586, 591 (9th Cir. July 8, 2009) (citing *Lingenfelter v. Astrue*, 504
 7 F.3d 1028, 1035-36 (9th Cir. 2007)). First, the ALJ must determine
 8 whether the claimant has presented objective medical evidence of an
 9 underlying impairment which could reasonably be expected to produce the
 10 alleged pain or other symptoms. *Lingenfelter*, 504 F.3d at 1036. "[O]nce
 11 the claimant produces objective medical evidence of an underlying
 12 impairment, an adjudicator may not reject a claimant's subjective
 13 complaints based solely on a lack of objective medical evidence to fully
 14 corroborate the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d
 15 341, 345 (9th Cir. 1991) (en banc). To the extent that an individual's
 16 claims of functional limitations and restrictions due to alleged pain is
 17 reasonably consistent with the objective medical evidence and other
 18 evidence in the case, the claimant's allegations will be credited. SSR
 19 96-7p, 1996 WL 374186 at *2 (explaining 20 C.F.R. §§ 404.1529(c)(4),
 20 416.929(c)(4)).¹⁰

21 Unless there is affirmative evidence showing that the claimant is
 22 malingering, the ALJ must provide clear and convincing reasons for
 23 discrediting a claimant's complaints. *Robbins*, 466 F.3d at 883. "General
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25 ¹⁰ "The Secretary issues Social Security Rulings to clarify the
 26 Secretary's regulations and policy Although SSRs are not published
 27 in the federal register and do not have the force of law, [the Ninth
 28 Circuit] nevertheless give[s] deference to the Secretary's
 interpretation of its regulations." *Bunnell*, 947 F.2d at 346 n.3.

1 findings are insufficient; rather, the ALJ must identify what testimony
2 is not credible and what evidence undermines the claimant's complaints."
3 *Reddick*, 157 F.3d at 722 (quoting *Lester v. Chater*, 81 F.3d 821, 834
4 (9th Cir. 1996)). The ALJ may consider objective medical evidence and
5 the claimant's treatment history, as well as the claimant's daily
6 activities, work record, and observations of physicians and third
7 parties with personal knowledge of the claimant's functional
8 limitations. *Smolen*, 80 F.3d at 1284. The ALJ may additionally employ
9 ordinary techniques of credibility evaluation, such as weighing
10 inconsistent statements regarding symptoms by the claimant. *Id.*

11 At the first administrative hearing before the ALJ on November 17,
12 2004, Plaintiff testified about the type and severity of pain she
13 experienced during the relevant time period, and the physical
14 limitations imposed by such pain. (AR at 1030-1041.) Plaintiff testified
15 that during and since the relevant time period, she has been
16 experiencing painful swelling, popping, and grinding, in her knees; that
17 she is not able to walk for more than ten minutes, or sit or stand for
18 an hour, without experiencing pain in her knees; that she experiences
19 constant pain in her thoracic spine that extends to the middle of her
20 chest, the severity of which she rated as a six on a scale of one to
21 ten; that she experiences lower back pain that she would rate at eight
22 out of ten, even after the lumbar surgery; that ever since the initial
23 injury in 1991, she experiences numbness and tingling in both legs; that
24 she experiences neck pain and severe headaches on a nearly daily basis,
25 which affects her ability to concentrate; and that the injury to her
26 right shoulder limits her ability to do things such as lift, reach, comb
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1 her hair, or fold clothes.¹¹

2 Plaintiff has met her burden of producing objective medical
 3 evidence of underlying impairments that are reasonably likely to be the
 4 cause of the alleged pain, thereby satisfying the threshold issue
 5 required by *Bunnell*. As *Bunnell* makes clear, once a claimant has
 6 produced evidence of an underlying impairment – which Plaintiff has as
 7 to her lumbar spine, cervical spine, right shoulder, and both knees –
 8 the ALJ “may not discredit the claimant’s allegations of the severity of
 9 pain solely on the ground that the allegations are unsupported by
 10 objective evidence.” 947 F.2d at 343. Once Plaintiff met this step, the
 11 ALJ was required to offer specific, clear and convincing reasons for
 12 rejecting Plaintiff’s testimony regarding her pain and other symptoms
 13 affecting her ability to work.

14 The ALJ failed to provide clear and convincing reasons for
 15 rejecting Plaintiff’s allegations of pain. “To support a lack of
 16 credibility finding, the ALJ [is] required to ‘point to specific facts
 17 in the record which demonstrate that [the claimant] is in less pain than
 18 she claims.’” *Vasquez*, 572 F.3d at 592 (quoting *Dodrill v. Shalala*, 12

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20 ¹¹ The Court notes that, at the second administrative hearing held
 21 on March 25, 2008, ALJ Hesse, rather than inquiring into Plaintiff’s
 22 subjective complaints of pain and attending physical limitations,
 23 focused primarily on irrelevant issues. For example, ALJ Hesse
 24 questioned Plaintiff on such matters as why she receives her mail at a
 25 post office box rather than a mailing address (AR at 1113-1114); how
 26 many times she has been married and who the father of each of her
 27 children is (AR at 1120-1123); whether she regularly attends church and
 28 the reasons why she does not (AR at 1124-1126); when she changed the
 name on her California driver’s license to her new married name and why
 she could not remember the exact date (AR at 1126-1129); and how she met
 her deceased husband, including how long they were living together
 before marriage (AR at 1129-1130). To the extent that the ALJ relied on
 Plaintiff’s testimony at the second administrative hearing in reaching
 her adverse decision regarding Plaintiff’s disability, this testimony
 was largely irrelevant and had no bearing on determinations of
 credibility or disability.

1 F.3d 915, 918 (9th Cir. 1993)). As in the ALJ's first adverse
 2 credibility determination, the ALJ has again failed to point to specific
 3 facts in the record to support her conclusion that Plaintiff is not
 4 fully credible. For example, the ALJ repeats verbatim her statement from
 5 the first decision denying Plaintiff disability benefits that "the
 6 medical evidence does not support the conclusion that [Plaintiff's]
 7 ability to perform her activities of daily living was so confined," yet,
 8 as before, the ALJ fails to cite to any specific evidence, medical or
 9 otherwise, in the record to support this conclusion. (AR at 57, 1065.)

10 In addition, the ALJ discredited Plaintiff's pain and symptom
 11 testimony for various reasons, none of which are clear and compelling.
 12 The ALJ noted that Plaintiff "attends her numerous doctors'
 13 appointments, drives a car, does grocery shopping, laundry, and
 14 generally got along well with family and friends." (AR at 1065.)
 15 Plaintiff's ability to go to her doctor's appointments¹², perform some
 16 basic household chores, complete sporadic activities and "get along"
 17 with family and friends is not inherently inconsistent with her
 18 complaints of pain. *See Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
 19 Cir. 2001) ("[T]he mere fact that a plaintiff has carried on certain
 20 daily activities, such as grocery shopping [or] driving a car ... does
 21 not in any way detract from her credibility as to her overall
 22 disability."). While a claimant's activities need not amount to work
 23 activity to undermine a claim of disability, *Morgan v. Comm'r*, 169 F.3d
 24 595, 600 (9th Cir. 1999), an ALJ may not reject a claimant's testimony
 25 simply because she engages in minimal daily activities despite her
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27 ¹² Indeed, one can surmise that had Plaintiff not gone to her
 28 doctor's appointments, that would have been a basis for rejecting her
 credibility.

1 impairments. *Vertigan*, 260 F.3d at 1050; see also *Orn v. Astrue*, 495
 2 F.3d 625, 639 (9th Cir.2007). Further, as Plaintiff testified at the
 3 second hearing before the ALJ, Plaintiff's husband performed almost all
 4 of the household chores. (AR at 1138-1139.) Accordingly, Plaintiff's
 5 ability to perform some household chores was not sufficient to support
 6 the rejection of Plaintiff's pain testimony.

7 The ALJ also discredited Plaintiff's subjective complaints of pain
 8 because each of Plaintiff's seven surgeries was apparently successful.
 9 (AR at 1065.) As the Court noted in its first remand, there is no
 10 evidence that successful back, neck and knee surgeries necessarily
 11 alleviated all of Plaintiff's pain. See *Vasque v. Barnhart*, 2002 U.S.
 12 Dist. LEXIS 14933, *37 (N.D. Cal. 2002); *Bunnell*, 947 F.2d at 343.
 13 Finally, as previously noted, some of the underlying impairments existed
 14 well before Plaintiff underwent surgery. The technical success of
 15 Plaintiff's surgery is irrelevant in determining whether Plaintiff's
 16 pre-surgery impairments were disabling.¹³ Therefore, this is not a clear
 17 and compelling reason for rejecting Plaintiff's subjective complaints of
 18 pain and other symptoms.

19 Finally, although the ALJ adduced a number of other reasons for not
 20 fully crediting Plaintiff's subjective pain testimony, upon review of
 21 the record, this Court concludes that the reasons given for discrediting
 22 Plaintiff's testimony are founded solely on a lack of objective medical
 23 evidence. The ALJ found that Plaintiff was not fully credible because
 24 she does not need assistive devices for ambulation, has no abnormalities

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 26 ¹³ The ALJ also stated that Plaintiff's injuries and surgeries
 27 "would have required some disability time prior to and after each
 28 surgery." (AR 57.) The Court was unable to discern from the ALJ's
 decision any clear and convincing reasons why the respective periods of
 disability did not last for the twelve-month period that is required to
 qualify for benefits. 20 C.F.R. § 404.1509.

1 of gait, and has not exhibited consistent evidence of diffuse atrophy or
2 muscle wasting. (AR at 1065.) While the ALJ may "consider" functional
3 restrictions caused by a claimant's symptoms, *Smolen*, 80 F.3d at 1284,
4 so long as Plaintiff offers evidence of a medical impairment that could
5 reasonably be expected to produce pain, the ALJ may not require the
6 degree of pain to be corroborated by objective medical evidence.
7 *Bunnell*, 947 F.2d at 346-47; *Smolen*, 80 F.3d at 1281; see also 20 C.F.R.
8 § 416.929(c)(2); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir.
9 2001). Here, the ALJ appears to have violated this principle concluding
10 that Plaintiff's complaints were not borne out by the objective medical
11 evidence. These reasons cannot, therefore, be considered substantial
12 support for the ALJ's credibility determination.

13 For the reasons stated above, the record shows that the ALJ failed
14 to provide specific, clear and convincing reasons for rejecting
15 Plaintiff's testimony.

16

17 **IV. Award of Benefits**

18 Upon determining that the Commissioner erred in denying benefits,
19 the Court may remand the case for further proceedings or award benefits.
20 Under the "crediting as true" doctrine, evidence should be credited and
21 an award of benefits is appropriate where (1) the ALJ improperly
22 rejected relevant evidence in the record; (2) no outstanding issues
23 prevent a disability determination from being made; and (3) the ALJ
24 would be required to award benefits if the improperly rejected evidence
25 were credited. *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir.
26 2004)(citations omitted); see also *Lingenfelter*, 504 F.3d at 1041
27 (citing *Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1401
28 (9th Cir. 1998)).

1 Here, the ALJ again failed to provide legally sufficient reasons
2 for rejecting Plaintiff's pain and symptom testimony, despite being
3 required to do so by this Court's previous remand order. In cases "where
4 there are no outstanding issues that must be resolved before a proper
5 disability determination can be made, and where it is clear from the
6 administrative record that the ALJ would be required to award benefits
7 if the claimant's excess pain testimony were credited, we will not
8 remand solely to allow the ALJ to make specific findings regarding that
9 testimony. Rather, we will ... take that testimony to be established as
10 true." Vasquez, 572 F.3d at 593 (quoting Varney, 859 F.2d at 1401.) If
11 Plaintiff's testimony as to her pain and other symptoms were credited as
12 true, it is clear that Plaintiff would be considered disabled under the
13 Social Security Act. There being no outstanding issues to resolve
14 through further administrative proceedings, an award of benefits is
15 appropriate.

V. Conclusion

For the reasons stated above, it is **ORDERED** that the case be remanded for an award of benefits.

DATED: August 21, 2009



MARC L. GOLDMAN
United States Magistrate Judge